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No. 1046

Supreme Court of the United States

OCTOBER TERM, 1966

AMERICAN TRUCKING ASSOCIATIONS, INC.,

Appellant,

v.

UNITED STATES OF AMERICA, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MOTION TO DISMISS, OR, IN THE ALTERNATIVE, TO AFFIRM

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April, 1967.

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TABLE OF CONTENTS

	PAGE
Statement	1
Argument	2
Conclusion	8
Proof of Service	9
Appendix A	10

INDEX TO CITATIONS

Cases:

American Trucking Associations v. *U. S.*, 355 U. S. 141 (1957) 2, 4

American Trucking Associations v. *U. S.*, 364 U. S. 1 (1960) 2, 4, 5

American Trucking Associations v. *U. S.*, 242 F. Supp. 597, 601 (D. C., 1965), aff'd 382 U. S. 373 (1966) 3

Atchison, Topeka and Santa Fe Ry. Co. v. *United States*, 130 F. Supp. 76, 78 (E. D. Mo., 1955) ... 3

Delaware, L. & W. R. Co. Extension—Corning, N. Y., 53 M.C.C. 614, 616 (1951) 6

Group of Boston & P.R.C. Stock v. *Interstate Com. Com'n*, 133 F. Supp. 488, 492-3 (E. D. Va., 1955) 3, 4

Long Island Rail Road Co. v. *New York Central R. Co.*, 281 F. (2d) 379 (1960) 8

Moffat Tunnel League v. *U. S.*, 289 U. S. 113, 119 (1933) 3, 4

PAGE

National Motor Freight Traffic Association v. *United States*, 205 F. Supp. 592, 593 (D. C., 1962) 3

New York Central Transport Co.—Modification, 89 M.C.C. 389, 397-400 (1962) 6

New York Central R. Co. Station at Jay Street Terminal, 310 I.C.C. 211 (1960) 7

New York Dock Ry. v. *Pennsylvania R. Co.*, 62 F. (2d) 1010, 1014 (Third Circuit, 1933), cert. den. 289 U. S. 750 (1933) 7

North Carolina Natural Gas Corp. v. *United States*, 200 F. Supp. 745, 751-2 (D. Del., 1961) 3

Pennsylvania Truck Lines Inc. Com. Car. Application, 33 M.C.C. 21, 33 (1942) 6

Pittsburgh & W. Va. Ry. v. *U. S.*, 281 U. S. 479, 486 (1930) 3

Sprunt & Son v. *United States*, 281 U. S. 249, 255 (1930) 3

Statutes:

Interstate Commerce Act, 49 U.S.C. §§ 1 et seq.
§ 1(18) (49 U.S.C. § 1) 6, 7
§ 5(2)(b) (49 U.S.C. § 5) 5
§ 17(11) (49 U.S.C. § 17) 4
§ 202(c)(2) (49 U.S.C. § 302) 6
§ 205(h) (49 U.S.C. § 305) 4
§ 207 (49 U.S.C. § 307) 5

Judiciary and Judicial Procedure, 28 U.S.C. §§ 1 et seq.
§ 1336 (28 U.S.C. § 1336) 3, 4
§ 1398 (28 U.S.C. § 1398) 3, 4
§§ 2321-2325 (28 U.S.C. §§ 2321-2325) 3, 4

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No. 1046

AMERICAN TRUCKING ASSOCIATIONS, INC.,
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v.

UNITED STATES OF AMERICA, *et al.*,
Appellees.

MOTION TO DISMISS, OR, IN THE ALTERNATIVE, TO AFFIRM

Appellee, New York Central Transport Company (hereinafter sometimes referred to as "Transport"), pursuant to Paragraphs 1(a) and 1(c) of Rule 16 of the Revised Rules of this Court, moves that this appeal be dismissed, or, in the alternative, that the judgment of the District Court be affirmed on the ground that the questions presented are so unsubstantial as not to require further argument.

Statement

To avoid repetition, Transport adopts and incorporates herein by reference that portion of the "Statement" contained in the Motion submitted by the United States and the Interstate Commerce Commission which pertains to Transport.[1] Transport must emphasize, however, that appellant's "Statement" neglects to mention that the Commission *denied* Transport's application (J.S. 41-45).[2]

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[1] Transport's application before the Interstate Commerce Commission was docketed as No. MC-67916 (Sub-No. 20) and styled New York Central Transport Company Extension—Oakbrook, Ill.

[2] This and similar references are to the pages of the Jurisdictional Statement filed by Appellant.

Argument

Although appellant sets forth in three separately numbered paragraphs its statement of the "Questions Presented", these questions in fact present but a single question for review. That question is whether or not in administering the Interstate Commerce Act the Interstate Commerce Commission (hereinafter sometimes referred to as "Commission") has disregarded the prior expressions of this Court in *American Trucking Associations* v. *U. S.*, 355 U. S. 141 (1957), and *American Trucking Associations* v. *U. S.*, 364 U. S. 1 (1960).

This question must be answered in the negative since it is uncontroverted that the service to be performed by Transport to and from Oakbrook, Ill. is within the terminal area of its parent, The New York Central Railroad Company (sometimes hereinafter referred to as "Central"), as defined in the latter's tariffs. Moreover, Transport's service at Oakbrook, Ill., as an operation within the terminal area of Central, has by its very nature "a limitation of function" (364 U. S. 1, 9), i.e., a prior or subsequent movement via Central's line of railroad to or from Chicago. Thus, contrary to the assertion of appellant, the Commission's order herein not only does not do "violence to Congressional policy", but it also is consistent with and implicitly affirms that policy which has "found favor in this Court" (364 U. S. 1, 9). It is submitted that in these circumstances the judgment of the District Court is so manifestly correct that this appeal presents no substantial question warranting plenary consideration by this Court.

1. It is unnecessary even to consider appellant's question, however, because appellant has suffered no legal wrong, actual or threatened, by reason of the Commission's orders herein. Appellant is but an association composed of "trucking associations"; it has no independent interest or

right which is affected by the Commission's orders. In fact, the only motor carrier protestant in the proceedings before the Commission withdrew its opposition in April, 1962, when Transport amended its application "so as to restrict the proposed service to traffic which has either a prior or subsequent rail movement". The law is clear that appellant has no status under Sections 1336, 1398 and 2321-2325 of the Judicial Code (28 U.S.C. §§ 1336, 1398, 2321-2325) to seek judicial review of an order which does not invade or affect any interest of appellant. *Sprunt & Son* v. *United States*, 281 U. S. 249, 255 (1930); *Pittsburgh & W. Va. Ry.* v. *U. S.*, 281 U. S. 479, 486 (1930); *Moffat Tunnel League* v. *U. S.*, 289 U. S. 113, 119 (1933); *Atchison, Topeka and Santa Fe Ry. Co.* v. *United States*, 130 F. Supp. 76, 78 (E. D. Mo., 1955); *Group of Boston & P.R.C. Stock* v. *Interstate Com. Com'n*, 133 F. Supp. 488, 492-3 (E. D. Va., 1955); *North Carolina Natural Gas Corp.* v. *United States*, 200 F. Supp. 745, 751-2 (D. Del., 1961); *National Motor Freight Traffic Association* v. *United States*, 205 F. Supp. 592, 593 (D. C., 1962).

This Court also has noted that there is a clear distinction between the right to intervene in proceedings before the Commission and the right "to institute an independent suit to set aside the Commission's order in the absence of resulting actual or threatened legal injury to it". *Pittsburgh & W. Va. Ry.* v. *U. S., supra*, at page 486; *Sprunt & Son* v. *U. S., supra; Atchison, Topeka and Santa Fe Ry. Co.* v. *U. S., supra.*

Recently the District Court for the District of Columbia stated that appellant "lack(s) status to maintain this action". *American Trucking Associations, Inc.* v. *U. S.*, 242 F. Supp. 597, 601 (D. C., 1965), affirmed 382 U. S. 373 (1966). That case did not turn on this issue because the Court upheld the Commission's order upon the merits. Here, American Trucking Associations, Inc., is the sole

party appellant. Thus the situation is clearly distinguishable from that in *American Trucking Associations* v. *U. S.*, 355 U. S. 141, and *American Trucking Associations* v. *U. S.*, 364 U. S. 1. In both of the latter appeals, several individual motor carriers, with justiciable interests, sued to set aside the Commission's orders. Intervention under Section 2323 of the Judicial Code (28 U.S.C. § 2323) by an association which participated at the Commission level is specifically authorized but this does not contemplate the independent institution of judicial review of Commission orders by persons lacking legal status to maintain such suits. See *Moffat Tunnel League* v. *U. S.*, *supra*, at page 119 and *Group of Boston and P.R.C. Stock* v. *Interstate Commerce Commission*, *supra*, at page 492.

The Court below expressed (J.S. 24, Fn.) a desire to dismiss the complaint for lack of standing of appellant to maintain the suit, but mistakenly concluded that this Court had "ruled otherwise", citing *American Trucking Associations* v. *U. S.*, 355 U. S. 141, 144 (1957). Examination of the cited case will reveal that the question of "standing to sue" therein determined was that of Railway Labor Executives' Association in Case No. 8, not that of the instant appellant, whose appeal was No. 6. This Court's conclusion as to the status of the labor association presents a wholly different issue of law in the light of the intent of Congress set forth in §§ 17(11) and 205(h).[3] The standing of appellant to institute and maintain an independent suit under Sections 1336, 1398 and 2321-2325 of the Judicial Code (28 U.S.C. §§ 1336, 1398 and 2321-2325), has not been determined by this Court to the knowledge of this appellee. Consistent with the prior expressions of this Court, this appeal should be dismissed for want of legal status of appellant to maintain this suit.

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[3] Unless otherwise indicated, sections referred to herein are of the Interstate Commerce Act.

2. It is apparent from appellant's "Questions Presented" that it has misconstrued this Court's prior decisions interpreting the Congressional policy of § 5(2)(b), as applied to § 207. The Congress has expressed no "policy against rail entry into the motor-carrier field" (J.S. 3), so long as the motor carrier service to be provided by the rail affiliate is auxiliary to or supplemental of rail service. Such a functional limitation satisfies the requirement that a rail carrier shall use its motor carrier affiliate's service to public advantage in its rail operations. *American Trucking Associations* v. *U. S.*, 364 U. S. 1, 9.

In the Report of the Commission on Reconsideration (J.S. 46-56) the Commission correctly found that the rail-affiliated applicants had established the "special circumstances" required to satisfy the "public advantage" mandate of § 5(2)(b), even without a functional limitation upon the operating rights sought (J.S. 53-4). In the Report of the Commission on Further Consideration (J.S. 31-45), however, the Commission upon further reflection concluded that there was no need to do a vain thing. Inasmuch as Transport was merely seeking authority to handle traffic restricted to prior or subsequent rail movements (J.S. 43) and could serve Oakbrook, Ill. as a point within Central's Chicago terminal area as the latter is presently defined in Central's tariff,[4] the Commission determined that sound regulatory policy dictated a denial of Transport's application (J.S. 40-1).

3. Appellant concedes (J.S. 21) that rail terminal areas are governed by tariff. Well it might, for in another proceeding involving appellant, Transport, and their respec-

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[4] At page 15 of its reply brief to the District Court, dated August 1, 1966, appellant "challenge(d) the Commission and the Transport Company to cite a tariff showing that Central holds itself out to provide service at Oakbrook." Appendix A hereto is a copy of page 85 of Central's currently effective Freight Tariff 6602-D, I.C.C. No. 2395.

tive counsel before this Court, the terminal operations of Transport were specifically considered. *New York Central Transport Co.—Modification,* 89 M.C.C. 389, 397-400 (1962). Thus, nearly five years ago appellant was put on notice that an operating rights proceeding was an inappropriate forum for establishment of territorial limits of a railroad's terminal area. The Commission's consideration of this subject in the case cited reflects the position consistently taken by the Commission. Other applications for operating rights by rail affiliated motor carriers which have been denied for the same reason as the denial of Transport's application in the instant case are *Pennsylvania Truck Lines Inc. Com. Car. Application,* 33 M.C.C. 21, 33 (1942), and *Delaware, L. & W. R. Co. Extension—Corning, N. Y.,* 53 M.C.C. 614, 616 (1951).

The existence of rail terminal areas long antedated the enactment of Part II of the Interstate Commerce Act. The partial exemption conferred by § 202(c)(2) compelled no change in the practice of defining rail terminal areas. If appellant believes that the fair and impartial regulation required by the National Transportation Policy suggests that motor carrier terminal areas also be fixed by tariff, proceedings toward that end should be instituted by appropriate petition to the Commission and not by collateral attack in this Court. Meanwhile, the District Court found Oakbrook "is properly described in a tariff of the New York Central Railroad as being within the railroad company's Chicago terminal area" (J.S. 29).

4. Nor is appellant upon sound ground in advancing the argument that the Commission has by its action herein ignored the requirements of § 1(18) (J.S. 15). It was well settled, even prior to the enactment of Part II of the Interstate Commerce Act, that operation of trucks within rail terminal areas, extending transportation service to parts of the terminal area not reached by established lines

of railroad, is not an extension of the railroad requiring a certificate of public convenience and necessity under § 1(18). In *New York Dock Ry.* v. *Pennsylvania R. Co.*, 62 F. (2d) 1010, 1014 (Third Circuit, 1933), cert. den. 289 U. S. 750 (1933), the court concluded:

> "* * * we hold that the proposed accessorial terminal service by trucks is not a 'railroad,' nor is it a 'line of railroad,' nor 'an extension of a line of railroad,' but it is a service of transportation which may be rendered by the defendant railroad company without first obtaining from the Interstate Commerce Commission a certificate of public convenience and necessity, subject of course to tariffs filed and allowed."

More recently a similar situation was considered by the Commission in *New York Central R. Co. Station at Jay Street Terminal*, 310 I.C.C. 211 (1960). In that proceeding Central proposed to establish a *new, off-track station* in Brooklyn and serve such station by truck from its railroad stations in Manhattan and Weehawken, N. J. The analogy to the motor service proposed between Central's rail station in Chicago and Oakbrook, Ill. is self-evident. Despite vehement objections of the rail carriers serving Brooklyn and to "enable the respondent (Central) to meet more effectively over-the-road truck competition" the Commission approved the proposal and concluded that such establishment of a new service did not require a Certificate, stating at page 220:

> "It is well settled that the establishment or maintenance of motor truck service by a common-carrier railroad does not constitute an extension of a line of railroad within the meaning of section 1(18) for which a certificate of public convenience and necessity is required." *Drayage and Unloading at Jefferson City*, Mo., 206 I.C.C. 436, 439.

For reasons stated in Judge Friendly's exhaustive opinion, the Second Circuit upheld the interpretation of the Commission in *Long Island Rail Road Co.* v. *New York Central R. Co.*, 281 F. (2d) 379 (1960).

Conclusion

For the foregoing reasons it is respectfully submitted that this appeal should be dismissed, or, in the alternative, that the judgment of the United States District Court for the District of Columbia should be affirmed at least insofar as it upheld the order of the Interstate Commerce Commission in Docket No. MC 67916 Sub-No. 20.

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April, 1967.

Proof of Service.

I, Kenneth H. Lundmark, one of the attorneys for New York Central Transport Company, appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 7th day of April, 1967, I served copies of the foregoing Motion to Dismiss, or, in the Alternative, to Affirm on the several parties hereto, as follows:

1. On the United States of America, by mailing copies in duly addressed envelopes, with first class postage prepaid, to Honorable Thurgood Marshall, Solicitor General, Honorable Donald F. Turner, Assistant Attorney General, Howard E. Shapiro, Esq., Richard A. Wegman, Esq., and Jerry Z. Pruzansky, Esq., Department of Justice, Washington, D. C. 20530; and David G. Bress, United States Attorney for the District of Columbia, U. S. Courthouse, Washington, D. C. 20001.

2. On the Interstate Commerce Commission, by mailing copies in duly addressed enevlopes, with first class postage prepaid, to Robert W. Ginnane, Esq., its General Counsel and Leonard S. Goodman, Esq., its Assistant General Counsel, at the offices of the Commission, Washington, D. C. 20423.

3. On American Trucking Associations, Inc., by mailing copies in duly addressed envelopes, with first class postage prepaid, to its counsel of record, Peter T. Beardsley, Esq., Richard A. Mehley, Esq., and Harry J. Jordan, Esq., 1616 P Street, N. W., Washington, D. C. 20036.

4. On Rock Island Motor Transit Company, by mailing copies in duly addressed envelopes, with air mail postage prepaid, to its counsel, Martin L. Cassell, Esq., Theodore E. Desch, Esq., George M. Mariner, Esq., and Thomas I. Megan, Esq., 139 W. Van Buren St., Chicago, Ill. 60605; and Walter J. Myskowski, Esq., 712 Ring Building, Washington, D. C. 20036.

KENNETH H. LUNDMARK.

APPENDIX A

NYC Freight Tariff 6602-D

(Item 140)

Areas of Stations Referred to on Pages 67 to 82 From and to Which Rates Apply

Chicago, Ill., Corporate limits of:

Service under the provisions of this tariff at Chicago, Ill., and points within the Chicago Switching District as described in IFA Tariff 20-Z, ICC 1006, will be accorded to the extent and as provided in the said IFA Tariff 20-Z, ICC 1006. Except as otherwise provided, rates published herein from or to, as the case may be, Chicago, Ill., will also apply from or to the following points (see Note 1):

Illinois	*Illinois*	*Illinois*	*Illinois*
Alsip	Dolton	Justice	Parkway
Argo	Dunning	La Grange	Phoenix
Bedford Park	East Hazel Crest	La Grange Park	Posen
Bellwood	East Main	Lansing (Cook	Proviso
Bensenville Yds.	Elk Grove Village	County)	Rhodes
Berger	(Bryn Mawr	Lincolnwood	Riverdale
Berkeley	District)	Lyons	River Forest
Bernice	Elmwood Park	McCook	River Grove
Berwyn	Evanston	Mannheim	Riverside
Blue Island	Evergreen Park	Markham	Robbins
Bridgeview	Fairview	Maywood	Rosemont
Broadview	Forest Park	Melrose Park	Schiller Park
Brookfield	Forest View	Merrionette Park	Skokie
Bryn Mawr	Franklin Park	Midlothian	South Chicago
Burnham	Glenn	Morton Grove	South Holland
Burr Oak	Globe	Mount Forest	Spring Forest
Calumet City	Goeselville	Niles	Stickney
Calumet Park	Golf	Norpaul	Stone Park
Chicago Heights	Haney	Norridge	Summit
Chicago Ridge	Harvey	North Lake	Thornton
Cicero	Harwood Heights	North Riverside	Tinley Park
Clearing	Hawthorne	Oakbrook	Westchester
Clyde	Hazel Crest	Oak Forest	Western Springs
Congress Park	Hickory Hills	Oak Glen	Willow Springs
Crestwood	Hillside	Oak Lawn	Wireton
Des Plaines	Hines	Oak Park	Worth
Deval	Hodgkins	Orchard Place	Yard Center
Dixmoor	Hometown	Palos Heights	
	Homewood	Park Ridge	

(Item 140 continued)

also any other location within the following described boundaries:

Beginning at a point on the south shore of Lake Michigan where the shore line converges with the Illinois-Indiana State Line: thence southward along the Illinois-Indiana State Line to 183rd Street; thence westward along 183rd Street (known for a short distance at Pearl Street and Beach Avenue) to South Harlem Avenue; thence northward along Harlem Avenue to West 87th Street; thence westward along 87th Street to old bed of Des Plaines River; thence southwestward along the old bed of the Des Plaines River to the DuPage-Cook County Line; thence northward along DuPage-Cook County Line to Mt. Prospect Road, at its junction with Devon Avenue; thence continuing northward along Mt. Prospect Road to Central Road; thence eastward along Central Street to the west shore of Lake Michigan; thence southward and eastward along the shore line (including piers) of Lake Michigan to the point of beginning.

Indiana	*Indiana*	*Indiana*	*Indiana*
East Chicago	Hammond	Munster	South Hammond
Gary	Hessville	North Hammond	State Line
Gibson	Indiana Harbor	Osborn	Whiting
Grasselli	Maynard	Roby	Wolf Lake

also any other location within the following described boundary, beginning on the shore of Lake Michigan, due north of Pine Junction, Ind., thence south to and including Pine Junction (including freight interchanged between the IHB and Wabash at Tolleston, Ind.); thence west to and including Clarke Junction, Ind.; thence southwesterly and south just west of the EJ&E to, but not including Ivanhoe, Ind.; thence southwesterly to and including Hessville, Ind.; thence westerly along the north bank of the Little Calumet River to Columbia Avenue (Hammond, Ind.); thence south on Columbia Avenue to Ridge Road; thence in a southwesterly direction on Dyer Road to a point one-half mile north of the GTWRR; thence in a southeasterly direction along a line one-half mile north of and parallel to the GTWRR to a point near the intersection of 45th Avenue and U. S. Highway 41; thence south along the west side of U. S. Highway 41 to a point north of the NYC(M)RR; thence in a southwesterly direction along a line north of and parallel to the NYC(M)RR to a point one-half mile west and south of the PRR; thence in a westerly direction to a point just north of the Dyer, Ind., yard limit on the MononRR, thence due west to the Illinois-Indiana State Line.

Note 1—Where specific rates are published herein from or to (as the case may be), a point named in this item, the provisions of this item do not apply from or to (as the case may be), that point.
(N1219-6127-8978)

For Explanation of Abbreviations and Reference Marks, see last page of this tariff.